



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON, D.C. 20370-5100

BJG
Docket No: 4343-00
14 December 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: IT2(SW [REDACTED], US [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 14 Jun 00 w/attachments
(2) OJAG (Code 20) memo dtd 16 Aug 00
(3) Memo for record dtd 30 Nov 00
(4) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected by reinstating him in pay grade E-6, petty officer first class, and by implication, setting aside his nonjudicial punishment (NJP) of 4 February 2000, at which he was reduced from pay grade E-6 to E-5, petty officer second class. A copy of the service record page 7 ("Court Memorandum") documenting the NJP is at Tab A. Petitioner also impliedly requested that his record be further corrected by removing the special enlisted performance evaluation report for 16 November 1999 to 4 February 2000, which references the NJP and was submitted on the occasion of his reduction in rate. A copy of this report is at Tab B.

2. The Board, consisting of Messrs. Cooper, Lightle, and McPartlin, reviewed Petitioner's allegations of error and injustice on 7 December 2000, and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. In correspondence attached as enclosure (2), the Office of the Judge Advocate General (Code 20) has commented to the effect that Petitioner's request to set aside the NJP has merit and warrants favorable action, if the results of his urinalysis test, which was procedurally defective, served as the sole basis for the NJP.

c. The memorandum for the record at enclosure (3) documents that a chief petty officer who was present at Petitioner's NJP stated that the only evidence considered was the results of his urinalysis test.

CONCLUSION:

Upon review of all the evidence of record, and especially in light of enclosures (2) and (3), the Board finds an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing all documentation of or reference to his NJP of 4 February 2000, and that all punishment awarded be set aside.

b. That Petitioner's record be further corrected to show he was not reduced from IT1, pay grade E-6, to IT2, pay grade E-5, on 4 February 2000, but continued to serve in the rate of IT1 after that date.

c. That Petitioner's record also be corrected by removing therefrom the following special enlisted performance evaluation report and related material:

Date of Report	Reporting Senior	Period From	of Report To
29 Feb 00		16 Nov 99	4 Feb 00

d. That there be inserted in Petitioner's naval record a memorandum in place of the removed report, containing appropriate identifying data concerning the report; that such memorandum state that the report has been removed by order of the Secretary of the Navy in accordance with the provisions of federal law and may not be made available to selection boards and other reviewing authorities; and that such boards may not conjecture or draw any inference as to the nature of the report.


e. That appropriate corrections be made to the magnetic tape or microfilm maintained by the Navy Personnel Command.

f. That any material or entries relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

g. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder


JONATHAN S. RUSKIN
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.


W. DEAN PFEIFFER
Executive Director



DEPARTMENT OF THE NAVY
 OFFICE OF THE JUDGE ADVOCATE GENERAL
 WASHINGTON NAVY YARD
 1322 PATTERSON AVENUE SE SUITE 3000
 WASHINGTON DC 20374-5066

IN REPLY REFER TO

5800
 Ser 20/0001
 16 Aug 2000

From: Deputy Assistant Judge Advocate General, Criminal Law Division (Code 20)
 To: Chairman, Board of Correction of Naval Records

Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IN THE CASE
 OF IT2(SW) [REDACTED] USN [REDACTED]

Ref: (a) Your req of 20 July 00 (Docket No: 4343-00)
 (b) OPNAVINST 5350.4C
 (c) COMNAVPERSCOM msg dtd 9 Jun 00

Encl: (1) BCNR File ICO IT2(SW) [REDACTED] USN

1. Pursuant to your request in reference (a), this office reviewed enclosure (1). Unfortunately, the file provided does not contain enough information to make a conclusive determination regarding the propriety of non-judicial punishment (NJP). The following comments are provided for your consideration.
2. First, it should be noted that the pertinent instruction regarding drug abuse screening and prevention is reference (b), OPNAVINST 5350.4C, not SECNAVINST 5350.4C as referenced in the petition. The OPNAVINST guides commanding officers in collection of urinalysis samples and processing drug abusers.
3. Commanding officers are directed to discipline drug abusers as appropriate and process them for separation. Prior to taking these steps, however, the commanding officer must be convinced that a drug incident has occurred. The instruction defines a drug incident as a knowing and wrongful use of a controlled substance.
4. According to enclosure 2, para. 9e(1-2) of reference (b), once a positive urinalysis occurs the commanding officer must determine whether it was the result of a drug incident or administrative error (e.g., chain of custody or handling problems with the sample). This determination should be based on factors such as witness statements, conduct and statements of the suspect, and the suspect's military record.
5. The information contained in enclosure (1) is insufficient for this office to make an independent determination regarding either the commanding officer's decision at NJP or the validity of the urinalysis. However, reference (c), contained in enclosure (1), reveals that other parties with greater information than contained enclosure (1), determined that

Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IN THE CASE

5. In the [REDACTED] case, administrative error clearly diminishes the validity of the urinalysis test, and if the test served as the only basis for disciplinary action and administrative processing, then these actions are invalid. However, the file does not contain sufficient information to determine whether the commanding officer found that [REDACTED] engaged in a drug incident based on evidence other than the urinalysis test. Reference (a) guides fact finders to look to numerous factors in deciding whether a drug incident took place, of which urinalysis results are only one. Without information regarding what the commanding officer actually considered in making his finding of misconduct during the NJP, we cannot determine the validity of [REDACTED]'s claim.

11. In short, if the urinalysis results served as the sole basis for the guilty finding at NJP, then the discipline is inappropriate. If the decision-makers considered other evidence to find a drug incident, then the discipline may be appropriate. My point of contact on this matter [REDACTED] Comm: [REDACTED]

[REDACTED]
CAPT, JAGC, USN

MEMORANDUM FOR THE RECORD

**DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR)
PERFORMANCE SECTION
2 NAVY ANNEX, SUITE 2432
WASHINGTON, DC 20370-5100
TELEPHONE: DSN 224-9842 OR COMM (703) 614-9842
FAX: DSN 224-9857, COMM (703) 614-9857**

DATE: 30NOV00

DOCKET NO. [REDACTED]

PETITIONER: [REDACTED]

PARTY CALLED: [REDACTED]

TELEPHONE NUMBER: [REDACTED]

WHAT I SAID: N/A

WHAT PARTY SAID: [REDACTED] INFORMED ME HE WAS PRESENT AT PET'S NJP AND THE ONLY EVI CONSIDERED WAS THE RESULTS OF THE URINALYSIS, AND THAT THEY WOULD HAVE NOTHING FURTHER IRT TO OUR LTR OF 19OCT00.

[REDACTED]